IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.840 OF 1999
IN
ARBITRATION PETITION NO.106 OF 1997
AND
APPEAL NO.1455 OF 1999
IN
ARBITRATION PETITION NO.108 OF 1997

Pawan Hans Helicopter Ltd., formerly known as Pawan Hans Pvt. Ltd., a Government of India undertaking registered under the provisions of the Companies Act, 1956, having its office at New Delhi and Regional Office at Juhu Aerodrome, Swami Vivekananda Road, Vile Parle, Bombay-400 056. .... Appellants (Ori.Petitioners)

- Versus -

Messers Associated Construction, a Partnership firm having its registered office at 3-B, Bharati Bhavan, Khar, Bombay-400 052. .... Respondents

Shri S.U. Kamdar with Ms Chhaya Shah & Shri Sudeep Dasgupta i/b M/s. Bhasin & & Co. for the Appellants in both the Appeals.

Sarvasri Pradip Sancheti with Karthik Somasundaram i/b M/s. Paras Kuhad & Associates for the Respondents in both the Appeals.

CORAM: R.M.S. KHANDEPARKAR &
D.G. KARNIK, JJ.

DATED: JUNE 07, 2007

JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. Since common questions of law and facts arise in

both these appeals, they were heard together and are being disposed of by this common judgment.

2. Pursuant to the allotment of work for construction of compound wall and for construction of a bridge over a nullah to the respondents, respective work contracts were entered into between the parties. The work in both the cases was required to be completed within a specified time. However, since it could not be completed within the said period, the time for completion of the work was extended. Consequent to the dispute arising between the parties, same was referred to arbitration in terms of the arbitration clause in the agreements. The learned arbitrator had held that the respondents would be entitled to claim 15% escalation charges as against the 30% escalation charges claimed by the respondents for the period beyond the expiry of the contractual period. As the appellants herein were not satisfied with the awards, they preferred petition under Sections 30 and 33 of the Arbitration Act, 1940, herein after referred to as "the said Act", for setting aside of the award. Consequently, the awards were partially modified to the benefit of the respondents. Being dissatisfied, the appellants have preferred these appeals.

3. The challenge to the impugned judgments and

consequently to the awards is three-fold: firstly, that the learned arbitrator could not have granted the claim for escalation of rates made by the respondents and, secondly, that the contract between the parties does not provide for second final bill and therefore no claim based on the second final bill could have been allowed by the learned arbitrator and thirdly that the arbitrator could not have entertained the dispute having been raised beyond the period of limitation. The challenge to the awards regarding grant of the claim for escalation of rates is on two grounds: firstly, that the claim could not have been granted in view of Clauses 18 and 34 of the agreement between the parties and secondly, that the respondents had already issued "No Due Certificate" and, therefore, any claim made after the issuance of such certificate could not have been granted.

4. As regards the first ground of challenge to the grant of escalation charges to the respondents, it is the case of the appellants that the escalation charges granted are for the period subsequent to the contractual period which is contrary to the terms of the contract in view of Clause Nos.18 and 34. The said clauses clearly indicate that the contract price was not subject to rise or fall in prices and therefore the appellants were not liable to pay any escalation charges. Reliance is

sought to be placed in the decision in the matter of **New India Civil Erectors (P.) Ltd. v. Oil and Natural Gas Corporation,** reported in AIR 1997 SC 980, and in the matter of **Steel Authority of India Ltd. v. J.C. Budharaja, Government and Mining Contractor,** reported in AIR 1999 SC 3275 as well as **State of Orissa v. Sri S.C. Roy (dead) by LRs.,** reported in JT 2001 (5) SC 267. Secondly, it is the contention of the appellants that the terms of the contract between the parties nowhere provide for any second final bill as such and this is also very clear from the Clauses 31 and 32 of the agreement and once the respondents had submitted the final bill, and further had issued the no claim certificate, it was not open for the arbitrator to grant any claim based on the second final bill. It is their case that the contractor was obliged to incorporate all his claims under the final bill which was duly confirmed by him on issuance of the no claim certificate. In that regard, reliance is sought to be placed in the decision in the matter of **Bharat Coking Coal Ltd. v. M/s. Annapurna Construction,** reported in AIR 2003 SC 3660. In any case, it is the contention on behalf of the appellants that the arbitrator misconducted himself in ignoring the no claim certificate and assuming the same to have been obtained under duress and further to assume about a trade practice, in the absence of any plea or evidence in that regard. As regards the second ground

of challenge, it is the contention on behalf of the appellants that in terms of Clause 56 of the contract, the respondents were required to raise the dispute within a period of 28 days from the issuance of the final certificate and the dispute was not raised within the said period.

5. On the other hand, it is the case of the respondents that in the proceedings under Sections 30 and 33 of the said Act the scope for interference by the Court is very limited and the Court cannot sit in appeal over the award. Reliance is placed in the decisions in the matters of **State of Rajasthan v. Puri Construction Co. Ltd. and another,** reported in (1994) 6 SCC 485 and **M/s. Sudarsan Trading Co. v. Government of Kerala and Another,** reported in (1989) 2 SCC 38. It is further contention on behalf of the respondents that the arbitrator was not required to give reasons and in the absence of reasons, merely because two views are possible, Court's interference would not be justified and, in any case, the grant of escalation is within the scope of the agreement and it relates to the matter of interpretation of the agreement and therefore merely because two views are possible, it would not warrant interference in the proceedings under Sections 30 or 33 of the said Act and in that regard reliance is sought to be placed in the decisions in the matters of **P.M. Paul**

v. Union of India, reported in AIR 1989 SC 1034 and **K.N. Sathyapalan (Dead) By Lrs. v. State of Kerala & Anr.,** reported in JT 2006 (10) SC 615. It is further contention on behalf of the respondents that the restrictions imposed under Clause 34 of the agreement are confined to the period, the duration of which was fixed under the contract and not for the extended or the delayed period and in that connection, reliance is placed in the decisions in the matters of **Hyderabad Municipal Corporation v. M. Krishnaswami Mudaliar and Mudaliar and another,** reported in (1985) 2 SCC 9 and **M/s. Metro Electric Co., New Delhi v. Delhi Development Authority, New Delhi,** reported in AIR 1980 Delhi 266. In relation to the No Due Certificate, it is the contention on behalf of the respondents that the evidence on record, as analysed by the arbitrator, clearly supports and justifies the respondents' plea of duress. Since the arbitrator is the final Judge of the quality and the quantity of evidence, no exception should be taken to the finding in that regard arrived at by the learned arbitrator. Once the No Due Certificate document was proved to have been obtained under duress, same cannot form the basis for any defence to the appellants. According to the learned Advocate for the respondents, the decision in **Nathani Steels Ltd. v. Associated Constructions,** reported in 1995 Supp (3) SCC 324, sought to be relied upon by the appellants, has

been considered and interpreted by the Apex Court in its judgment delivered in **Chairman & M.D., N.T.P.C. Ltd. v. M/s. Reshmi Constructions, Builders & Contractors,** reported in JT 2004 (1) SC 1. According to the respondents, the final bill which was issued and in relation to which the No Due Certificate is stated to have been issued, related only to the quantities for the work, etc., under the contract but did not include the claim for compensation in respect of which the ultimate final bill was issued, and which has been termed as the second final bill. The Clause 31.5(A) of the agreement deals with the measurement and valuation of the work including the final measurement and valuation, and therefore, it obviously refers to the bill raised on the quantity of work and the other claims. It is thus clear that there is direct or express provision in the contract providing for such other claims to be included in the final bill, besides the Clause 43(1) expressly deals with the loss and expenses which are not covered under the other provisions of the contract and which requires the Architect to ascertain the amount of such loss and expenses and therefore nothing prevented the respondents from raising the second final bill. It is also sought to be contended that while claiming damages, the parties can enlarge the scope of reference by inclusion of fresh dispute provided they have done so while putting forward their claims in reference and in

that regard reliance is sought to be placed in the decision in the matter of **McDermott International Inc. v. Burn Standard Co. Ltd & Ors.,** reported in JT 2006 (11) SC 376. As regards the issue pertaining to the trade practice, it is the contention on behalf of the respondents that no issue in that regard was raised or argued before the learned single Judge and there is no reference to the same in the impugned order and therefore they are not entitled to raise the same, for the first time, in the appeal. In any case, Clause 56 of the agreement clearly provided that the arbitrators would be the Fellows of the Indian Institute of Architects, meaning thereby that the arbitrators would be specialised people in their field having vast experience and knowledge of the various trade practices being followed in the business and they are required to apply their knowledge of the field while adjudicating the claims and that is what exactly the learned arbitrator has done in the matter in hand and therefore it would not be a justification for interference therein. Reliance is placed in the decision in **Daulatsing Bapusing Raut v. Ratna Anadsing and others,** reported in AIR 1926 Bombay 527.

6. It cannot be disputed that the scope of interference under Section 30 or 33 of the said Act is very limited. The law on this point is well-settled. The Apex Court

in **Puri Construction Company's** case (supra) and the paras 27 and 28 thereof, to which attention was sought to be drawn, has held that appraisement of evidence is essentially the function of the arbitrator in arbitration proceedings and the Court does not sit in appeal in that regard nor the conclusions arrived at by the arbitrator on the question of law referred to arbitrator are open to challenge on the ground that an alternative view of law is possible. In para 27, the Apex Court had referred to its earlier decision in **Municipal Corporation of Delhi v. Jagan Nath Ashok Kumar** {(1987) 4 SCC 497} = AIR 1987 SC 2316 and observed that it was held therein that appraisement of evidence by the arbitrator is ordinarily never a matter which the Court questions and considers though it may be possible that on the same evidence the Court may arrive at a different conclusion than the one arrived at by the arbitrator but that by itself would not be a ground for setting aside the award. In para 28, referring to its earlier decisions in **Alopi Parshad & Sons Ltd. v. Union of India** {AIR 1960 SC 588}, **Kapoor Nilokheri Coop. Dairy Farm Society v. Union of India** {(1973) 1 SCC 708} = AIR 1973 SC 1338 and **Indian Oil Corpn. Ltd. v. Indian Carbon Ltd.** {(1988) 3 SCC 36} = AIR 1988 SC 1340 the Apex Court reiterated its earlier decision that the Court does not sit in appeal over the award and review the reasons and the Court can set aside the award only

if it is apparent from the award that there is no evidence to support the conclusions or if the award is based upon any legal proposition which is erroneous.

7. In **M/s. Sudarsan Trading Company's** case (supra), and in para 29 of the judgment to which attention was drawn, the Apex Court while observing that in a speaking award the Court can look into the reasonings disclosed in the award, held that where no reasons are given by the arbitrator, it is not open to the Court to probe into the mental process of the arbitrator and speculate as to what impelled the arbitrator to arrive at his conclusions and in that regard reference was made to its earlier decision in **Hindustan Steel Works Construction Ltd. v. C. Rajasekhar Rao** {(1987) 4 SCC 93}.

8. While the decision of the Apex Court in **Puri Construction Company's** case is on the point that reappraisal of the evidence is not the function of the Court while dealing with the matters under Section 30 or 33 of the said Act, and that the Court does not sit in appeal over the award and review the reasons, the decision in **M/s. Sudarsan Trading Company's** case is on the point that in the absence of reasons given by the arbitrator, it would not be appropriate for the Court to probe into the mental process of the arbitrator and speculate about the reasons which could have impelled

the arbitrator to arrive at a particular finding. We fail to understand how both these decisions are of any help to the respondents in the case in hand. It is nobody's case that in order to consider the contentions raised by the appellants, we are either required to re-appreciate the evidence or that we have to speculate about the reasons for arriving at the conclusions which have been arrived at in the award. In the absence of any such exercise being required to be done by this Court in these appeals, the decisions sought to be relied upon and the arguments advanced based on these decisions are of no help to the respondents in the case in hand.

9. The Clause Nos.18 and 34 of the contract to which attention was drawn in support of the contention that the appellants are not liable to pay any escalation in the rates read thus:

> "18. The term "Clerk of Works" shall mean the person approved by the Architect and appointed and paid by the Owner and acting under the orders of the Architect to inspect the works in the absence of the Architect; the Contractor shall afford the Clerk of Works every facility and assistance for

inspecting the works and materials and for checking and measuring time and materials. Neither the Clerk of Works nor any representative of the Architect shall have power to set out works or to revoke, alter, enlarge or relax any requirements of the Contract or to sanction any day work, additions, alterations, deviations or omissions, or any extra work whatever except in so far as such authority may be specially conferred by a written order of the Architect.

The Clerk of Works or any representative of the Architect, shall have power to give notice to the Contractor or to his representative of non-approval of any work or materials and such work shall be suspended or the use of such materials shall be discontinued until the decision of the Architect, is obtained. The works will from time to time be examined by the Architect, the Clerk of Works or the Architect’s representative but such examination shall not in any way exonerate the Contractor from the

> obligation to remedy any defects which may be found to exist at any stage of the works or after the same is completed. Subject to the limitation of this clause the Contractor shall take instructions only from the Architect."
>
> "34. The Contractor shall not claim any extras for fluctuation of price and the Contract Price shall not be subject to any rise or fall of prices."

10. Plain reading of the above clauses of the agreement would reveal that the contractor cannot claim any extra amount for fluctuation of price and the contract price was not subject to any rise or fall in the prices. In other words, irrespective of fluctuation of prices in the market in relation to the commodities to be used for compliance of obligations under the work contract, the contractor was to complete the construction and submit the bills adhering to the prices specified under the contract. Neither any rise in the price nor any fall in the price could be the basis either to claim escalation or reduction in the liability by the appellants to pay the amount to be paid to the respondents for completion of the work under the said contract.

11. The decision of the Apex Court in **New India Civil Erector's** case (supra) is squarely on the subject relating to the claim of the contractor for escalation in the cost of construction. In the said case, the contractor under the contract with the ONGC had undertaken to construct 304 pre-fabricated housing units at Panvel, Phase-I. The construction was not completed even within the extended period and the respondents thereupon terminated the contract and got the work done through another agency. Dispute arose between the parties and the matter was referred to arbitrators. In the arbitration proceedings, the contractor claimed an amount of Rs.32,21,099.89 paise as escalation charges against which the arbitrators awarded a sum of Rs.16,31,425/-. The claim was made on account of escalation in the cost of construction during the period subsequent to the expiry of the original contract period. The contractor's claim on the said amount was resisted by the ONGC on the basis of the ONGC's acceptance letter dated 10-1-1985 which stated clearly that "the above price is firm and is not subject to any escalation under whatsoever ground till the completion of the work". When the matter came up before this Court, it was held that in the face of the said express stipulation between the parties, the contractor could not have claimed any amount on account of escalation in the cost of construction carried out by him after the

expiry of the original contract period. While approving the said decision of this Court, the Apex Court ruled that "The aforesaid stipulation provides clearly that there shall be no escalation on any ground whatsoever and the said prohibition is effective till the completion of the work". It was further held that in view of the said clause, the arbitrators could not have awarded any amount on the ground that the contractor must have incurred extra expense in carrying out the construction after the expiry of the original contract period and the aforesaid stipulation between the parties was binding upon both of them as well as the arbitrators. It was further ruled that:

> "We are of the opinion that the learned single Judge was not right in holding that the said prohibition is confined to the original contract period and does not operate thereafter. Merely because the time was made the essence of the contract and the work was contemplated to be completed within 15 months, it does not follow that the aforesaid stipulation was confined to the original contract period. **This is not the case of the arbitrators construing the agreement. It is a clear case of the**

> **arbitrators acting contrary to the specific stipulation/condition contained in the agreement between the parties**."
>
> (Emphasis supplied)

The decision of the Apex Court is very clear to the effect that:

(i) When the contract between the parties stipulates that the contractor would not be entitled for increase in prices of the commodities to be used for completion of the contract, he would not be entitled for escalation in the costs.

(ii) Such a term would not only bind the parties to the contract, but it would also bind the arbitrator while deciding the disputes between the parties.

(iii) Such a case does not fall in the ambit of "construction but it is a case of acting within or contrary to the specified stipulation in the contract".

12. In **Steel Authority of India's** case (supra), the contractor was required to complete the work within a period of two years. After the expiry of the period of

two years, the contractor raised a claim of about Rs.18 lakhs as damages for delay in handing over the work sites and allied reasons. Such a claim was put forth on 29-8-1979. Thereafter on 20-12-1980, a supplementary agreement was executed between the parties for the same work at the increased rate. Despite the fact that supplementary agreement was executed for the same work at the increased rate, the Steel Authority of India wrote a letter dated 3-9-1983 repudiating the claim of Rs.18 lakhs on account of damages for any loss sustained by the contractor, which was claimed by him by his letter dated 29-8-1979. Thereafter disputes arose and and the matter was referred to arbitration. The arbitrator gave award granting damages to the tune of Rs.11,26,296/- and further sum of Rs.12,06,000/- towards interest with further interest at the rate of 17%. The award was made the rule of the Court on 2-4-1990 with the modification for payment of interest at the rate of 8%. The appeal before the High Court failed and the matter was taken up before the Apex Court. Referring to Clauses 25, 32 and 39 of the agreement, the Apex Court held that the agreement specifically stipulated that no claim whatsoever for not giving the entire site for the work and for giving the site gradually would be tenable and the contractor was required to arrange his working programme accordingly and further that no failure or omission to carry out the provisions of the contract

would give rise to any claim by the Corporation and the contractor, one against the other, if such failure or omission arises from compliance with any statute or regulation of the Government or other reasons beyond the control of either the Corporation or the contractor. Considering the facts which revealed necessary permission from the various departments as well as various other reasons which were beyond the control of the Corporation and as there was extension of time for completion of the work with the specific provision prohibiting grant of claim for damages, in those circumstances, it was held that:

> "It was not open to the arbitrator to ignore the said conditions which are binding on the contracting parties. By ignoring the same, he has acted beyond the jurisdiction conferred upon him. **It is settled law that arbitrator derives the authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be arbitrary one**."
>
> (Emphasis supplied)

It was further held that:

> "in cases where there is no question of interpretation of any term of the contract, but of solely reading the same as it is and still the arbitrator ignores it and awards the amount despite the prohibition in the agreement, the award would be arbitrary, capricious and without jurisdiction. Whether the arbitrator has acted beyond the terms of the contract or has travelled beyond his jurisdiction would depend upon facts, which however would be jurisdictional facts, and are required to be gone into by the Court. **Arbitrator may have jurisdiction to entertain claim and yet he may not have jurisdiction to pass award for particular items in view of the prohibition contained in the contract and, in such cases, it would be a jurisdictional error.**"
>
> (Emphasis supplied)

13. While delivering the said decision in Steel Authority of India's case, the Apex Court had referred to two of its earlier decisions - one in **Continental Construction Co. Ltd. v. State of Madhya Pradesh** {AIR 1988 SC 1166} and another in **H.P. State Electricity**

Board v. R.J. Shah and Company {(1999) 4 SCC 214}.

14. In **Continental Construction Company's** case (supra) the Apex Court has held that the clauses of the contract which stipulated that the contractor had to complete the work inspite of rise in prices of materials and also rise in labour charges at the rate stipulated in the contract, in those cases, the arbitrator could not allow the contractor's claim in contravention of those clauses. It was specifically held therein that it was not open to the contractor to claim extra costs towards the rise in prices of the material and labour and the arbitrator had misconducted himself in not deciding the specific objection regarding the legality of the extra claim. While holding so, it was specifically ruled that:

> "If no specific question of law is referred, the decision of the arbitrator on that question is not final however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally. **The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The arbitrator is a**

> **tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not he can be set right by the Court provided his error appears on the fact of the award**."
>
> (Emphasis supplied)

15. In **R.J. Shah's** case (supra) the Apex Court held that in order to find out whether the arbitrator has acted in excess of the jurisdiction, the Court may have to look into some documents including the contract. It was specifically held that:

> "In order to determine whether the arbitrator has acted in excess of jurisdiction what has to be seen is whether the claimant could raise a particular dispute or claim before the arbitrator. If the answer is in affirmative, then it is clear that arbitrator would have the jurisdiction to deal with such a claim. On the other hand if the arbitration clause or a specific term in the contract or the law does not permit or give the arbitrator the power to decide or to adjudicate on

> a dispute raised by the claimant or there is a specific bar to the raising of a particular dispute or claim, then any decision given by the Arbitrator in respect thereof would clearly be in excess of jurisdiction."

16. In **Sri S.C. Roy's** case (supra) the Apex Court, after taking note of the settled law on the point that in the absence of escalation clause in the arbitration agreement, the arbitrator would not be entitled to grant escalation charges in view of the decision in the matter of **Secretary, Irrigation Department, Government of Orissa & Ors. v. G.C. Roy** {JT 1991 (6) SC 349}, held that once the agreement discloses no escalation clause and a specific objection is raised in that regard, the arbitrator cannot grant escalation charges.

17. As already seen above, Clause 34 of the agreement specifically prohibits the respondents from claiming any extra amount on account of fluctuation of prices. It specifically provides that the contractor shall be entitled for the contract price irrespective of any rise or fall in the prices. There being a clear contract against entitlement for escalation in the rates to the contractor, irrespective of fluctuation in the prices of the materials to be used for completion of the work

contract as also labour charges, and a specific objection in relation to that claim having been raised before the arbitrator, it was not open to the arbitrator to grant escalation charges to the respondents.

18. Attention was sought to be drawn to Clause 43.(1)(E) of the agreement. The said clause provides thus:

> "43.(1)(E): Architect's instructions issued in regard to the postponment of any work to be executed under the provisions of this Contract; and if the written application is made within a reasonable time of it becoming apparent that the progress of the work or of any part thereof has been affected as aforesaid. Then the Architect shall ascertain the amount of such loss and/or expense. Any amount from time to time so ascertained shall be added to the amount which would otherwise be stated as due in such certificate."

The said clause, however, is not independent of Clause 43.(1). The Clause 43.(1) reads thus:

> "43.(1): If upon written application being made to him by the Contractor the Architect is of the opinion that the Contractor has been involved in direct loss and/or expense for which he would not be reimbursed by a payment made under any other provision in this Contract by reason of the regular progress of the works or of any part thereof having been materially affected by:"

Evidently therefore, before referring to Clause 43.(1)(E), it is necessary for the respondents to comply with the Clause 43.(1). It is nobody's case that the respondents had in fact made any written application to the architect for his opinion in terms of Clause 43.(1). The learned single Judge, in the impugned order, has observed that:

> "Further under clause 43(1)E of the agreement, the Architect would ascertain the amount of such loss and/or expense and the amount could be taken into consideration while preparing a final certificate."

Neither the award nor the impugned order refers to compliance of pre-requisites of Clause 43.(1)(E). Mere reference to Clause 43.(1)(E) cannot itself empower the arbitrator to award escalation charges.

19. The decision in **P.M. Paul's** case (supra) is of no help to the respondents. In the said case, the dispute that was referred to the arbitrator was as to who was responsible for the delay, what were the repercussions of the delay in completion of the construction of building and how to apportion the consequences therefrom. Obviously, the matter relating to the escalation costs was within the jurisdiction of the arbitrator and hence it could not have been held that the learned arbitrator had misconducted himself in awarding the escalation charges. Being so, once it was found that the arbitrator had jurisdiction to find that there was delay in execution of the contract due to the conduct of the Government, the latter was held liable for the consequences of delay, namely, increase in prices and therefore the arbitrator had jurisdiction to go into the said question and award the escalation charges. That is not the case in the matter in hand. On the contrary, as already seen above, there is specific clause prohibiting the claim for escalation charges. Hence the arbitrator was not entitled to award the escalation in the rates beyond those agreed upon

under the contract between the parties.

20. The decision in **K.N. Sathyapalan's** case (supra) is also of no help to the respondents in justifying the escalation claim. In K.N. Sathyapalan's case, undoubtedly, the Apex Court had held that the grant of escalation charges were justified in the peculiar facts and circumstances established before the learned arbitrator and therefore had held that:

> "**In the aforesaid circumstances,** the Arbitrator appears to have acted within his jurisdiction in allowing some of the claims on account of escalation of costs which was referable to the execution of the work during the extended period."
>
> (Emphasis supplied)

Apparently, therefore, the decision was in the peculiar facts of the case and, therefore, clearly distinguishable as the facts of the case in hand are totally different from those of **K.N. Sathyapalan's** case.

21. Similarly, the decision in **Hyderabad Municipal Corporation's** case (supra) is concerned, therein, due to financial difficulties the Government had requested to

spread over the work for two years more i.e. to say to complete the same in three years. The contractor agreed to spread over the work for two years more, as suggested, on condition that extra payment would be made to him in view of increased rates of materials and/or wages. The Government did not intimate to the contractor that no extra payment on account of increased rate would be paid to him or that he was required to complete the work on the basis of the original rates. In fact, no reply was sent by the Government and a studied silence was maintained in regard to the contractor's demand for extra payment in spite of several reminders in that behalf till the contractor actually completed the work during the spread period and only after completion of the work, when the contractor submitted his final bill claiming 20% extra over and above the rates originally agreed upon between the parties, that the Government stated that the contractor was not entitled for the increased rates. The Apex Court held that:

> "After considering the relevant material on record we are of the view that both in equity and in law the plaintiff contractor is entitled to receive extra payment and the High Court was right in deciding the question in

respondent-plaintiff’s favour."

Apparently, that was a case in the peculiar set of facts of that case which are nowhere near the facts of the case in hand.

22. In **Metro Electric Company’s** case (supra), decided by the Delhi High Court, there was the Clause 10C in the agreement between the parties which provided for the claim relating to increase in labour and material charges. The said Clause, however, was applicable if during the progress of the work, the prices of the material or labour rise and only such increase was permissible which was beyond 10% of the original cost wages and it was required to be certified by the Chief Engineer that it was not attributable to delay on behalf of the contractor. The facts of the case further reveal that the increased rates claimed by the contractor were in respect of the work which had to be carried out after the initial contract period had expired. It was also clear that because of the fault on the part of the Delhi Development Authority in not handing over the site to the contractor that the contractor was unable to complete the work and thus there was a breach of contract by the Delhi Development Authority and the contractor was entitled for damages. Further more, the decision clearly observed that:

> "since it was agreed by the parties that the work should be taken up by the contractor from where he had to stop and it was simultaneously agreed by the parties that the arbitrator (the Chief Engineer of the D.D.A.) would decide the quantum of damages in the form of increased rates, the application of Cl.10C of the agreement was really extraneous and irrelevant."

Apparently, there was a clear agreement between the parties to ascertain the loss suffered by the contractor on account of the delay caused in completion of the work as a result of breach on the part of the Delhi Development Authority in providing the work site for carrying out the construction by the contractor. It was clearly in the peculiar facts of the case where there was an agreement between the parties consenting for the claim on the ground of escalation charges.

23. It is pertinent to note that in the course of the arguments, apart from referring to Clause 43.(1)(E), the learned Advocate appearing for the respondents has not been able to point out any clause which could be an exception to Clause 34 of the agreement between the

parties. Once it is apparent that Clause 34 specifically prohibits grant of escalation charges, and it is not disputed that the respondents were bound by Clause 34 of the agreement between the parties, it is apparent on the face of the record that the arbitrator could not have granted escalation charges in contravention of the said Clause 34, and having done so, has clearly misconducted himself and this aspect has been totally over-looked by the learned single Judge while passing the impugned orders.

24. It was strenuously argued that Clause 34 merely relates to the contractual period and not for the extended or the delayed period. As already seen above, in **Hyderabad Municipal Corporation's** case as well as in **Metro Electric Company's** case the delay was clearly on account of the Principal and not on account of the contractor. Secondly, the delay could have been avoided by the Principal. That is not the case in the matter in hand. Besides, Clause 34 nowhere restricts its applicability to the contractual period. It would apply irrespective of the delay on the part of the respondents in complying with their obligation under the agreement. If we accept the contention on behalf of the respondents in that regard, it would virtually defeat the very purpose and object behind the said clause. Once it is apparent that plain reading of the said clause would not

permit the contractor to claim escalation charges, it would be impermissible for the arbitrator and for the same reason, to the Court, to interpret the said clause to the benefit of the respondents/contractor ignoring that the interpretation would defeat the very purpose and object behind the clause. Besides, it is not the case of the respondents that on expiry of the period under the contract, the latter had insisted for increase in the contractual rates and that nothing was heard in that regard from the appellants.

25. The Apex Court in **Bharat Coking Coal Limited's** case (supra), while reiterating its earlier decisions in **Associated Engineering v. Govt. of A.P.** {AIR 1992 SC 232} and **M/s. Sudarsan Trading Co. v. The Govt. of Kerala** {AIR 1989 SC 890} to the effect that the arbitrator cannot travel beyond the parameters of the contract and the arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award held that:

> "There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from

> what the parties have given him under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameter of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the records."

Applying this law laid down by the Apex Court to the facts of the case in hand, it is apparent that the arbitrator clearly travelled beyond the terms of the contract in relation to the claim made by the respondents for the escalation charges for the period after the expiry of the original period under the contract.

26. Once it is clear that the respondents are not entitled to claim escalation charges, and the entire dispute, which is the subject-matter of the appeals being related to the escalation charges, the impugned orders, to the extent they confirm the award in relation to the escalation charges, are liable to be set aside and the petitions filed by the appellants challenging the awards in relation to the grant of the escalation charges are liable to be allowed to that extent. Consequently, the claims for interest on the amount of

damages awarded towards the escalation are also liable to be set aside.

27. As regards the point relating to the "No Due Certificate", though it has been strenuously argued on behalf of the respondents that the same was obtained under duress, and there is a clear finding in that regard by the arbitrator, confirmed by the learned single Judge, it is apparent from the records that there is absolutely no evidence led by the parties in support of the claim of economic duress, alleged to have been exercised by the appellants qua the respondents to issue such certificate. Attention was sought to be drawn to the letters dated 26-12-1991 and 14-7-1992 by the respondents and the letter dated 6-8/10th June, 1992 by the appellants to the respondents in that regard. The letter dated 26-12-1991 and 14-7-1992 apparently disclose that neither of these letters speak about economic duress for issuance of no claim certificate. On the contrary, the specific averments in the said letters disclose that the same was required to be issued by the respondents to enable the appellants to make the payment in terms of the final bill submitted by the respondents. The certificate was not required to be issued by the respondents without submitting their final bill but on the contrary to confirm that the final bill submitted by the respondents was really the final bill

and no further bill had remained to be submitted. Had there been any amount still due and payable by the appellants to the respondents, nothing prevented the respondents from including such amount in the final bill which was issued by the respondents as the final bill in the matter. Being so, the requirement of issuance of the certificate regarding no dues, was to enable the appellants to make the payment in relation to the bill which was submitted by the respondents themselves as the final bill. Being so, one fails to understand how there was any duress being exercised by the appellants in obtaining such certificate. Apparently therefore, the finding arrived at in that regard by the arbitrator and the learned single Judge is without any evidence on record.

28. The appellants are justified in contending that once the respondents had issued the No Due Certificate subsequent to the submission of the final bill, the matter squarely disclosed that the respondents had resolved to accept the bill which was submitted by them as a final bill, was in fact the final bill and in that connection the appellants are justified in drawing attention to the decision in **Nathani Steels Limited** (supra). The Division Bench of this Court in **Kelkar and Kelkar v. Indian Airlines & another,** reported in 2004 (2) Bom.C.R. 57, after referring to Nathani Steels

Limited's case has clearly held that once there is a full and final settlement in respect of any particular dispute or difference in relation to a matter covered under the arbitration clause in the contract, and the dispute or difference is finally settled between the parties, such a dispute or difference does not remain to be an arbitral dispute and an arbitration clause cannot be invoked. It was specifically held that the Apex Court had clearly ruled that:

> "once the parties have arrived at the settlement in respect of any dispute or difference arising under the contract and that dispute or difference is settled by way of final settlement by and between the parties, unless that settlement is set aside in an appropriate proceedings, it cannot lie in the mouth of one of the parties to the settlement to challenge it on the ground that it was a mistake and to proceed to invoke the arbitration clause. In the words of Supreme Court, if this is permitted the sanctity of contract, the settlement also being a contract, would be wholly lost and it would be open to one party to take the

> benefit under the settlement and then question the same on the ground of mistake without having the settlement set aside."

By issuing the No Due Certificate, the respondents had clearly consented that the amount which was due to the respondents was in terms of the final bill submitted by the respondents and, therefore, it was not open for the respondents thereafter to ignore the said settlement between the parties revealed from the No Due Certificate issued by the respondents and then to make claim by the second final bill.

29. Indeed, the contract between the parties nowhere stipulates for issuance of any second final bill as such. One fails to understand how the arbitrator could refer to the so called trade practice to endorse the second final bill. It is to be noted that the parties had not led any oral evidence. Even in the documentary evidence, the parties had not led any material in support of any trade practice. In fact, it was nobody’s case before the arbitrator that there existed any such trade practice. The arbitrator is not empowered to dig out new plea or case for a party to the proceedings before him nor can take into consideration some extraneous materials in support of a party’s case. It

was sought to be contended that the appellants had not raised the point regarding the finding about trade practice while filing objections before the learned single Judge. The contention is totally devoid of substance. The point was specifically raised in Clause (i) of the memo. Besides, the entire challenge was that the grant of escalation charges was contrary to the terms of the contract and, therefore, the learned arbitrator misconducted himself in travelling beyond the scope of the contract. Merely because the arbitrator happens to be a technical expert in the field, that would not permit him to travel beyond the periphery of the contract. An arbitrator is always bound by the terms of the agreement between the parties. It is true that this Court in **Daulatsing Bapusing Raut's** case (supra) had held that where a particular arbitrator has been selected only because of his personal knowledge in the matter in dispute, use of his personal knowledge in coming to a certain decision is not barred. That is not the case in the matter in hand. The said decision is of no help in the facts and circumstances of the case where the dispute is referred solely to be decided in terms of the agreement between the parties. In any case, the trade practices cannot override the specific clause of the contract arrived between the parties. The trade practice has to yield to the specific clause to the contrary in the agreement between the parties, unless

the clause is legally not permissible or is against the public policy or for any other valid reason duly pleaded and established by evidence on record sufficient to prove such clause to be unenforceable.

30. The decision of the Apex Court in **McDermott International's case** (supra) is of no assistance to the respondents in the matter in hand. The point for consideration in McDermott International's case was as to whether the invoice was the only base whereby and whereunder a claim could have been made and in that regard it was held that though an invoice was drawn in respect of a claim made in terms of the contract, yet for raising a claim based on breach of contract, no invoice was required to be drawn. It was in that connection held that there was no dispute that the claim for damages had been made prior to invocation of arbitration. One cannot pick and choose a sentence from a judgment and interpret it as a statutory provision. The observation in a judgment is to be understood with reference to the facts of the case and the point which arise for determination in those facts and the applicability of law thereto. The observation in the judgment cannot be read de hors the facts and the point arising for decision in that case.

31. In **M/s. Reshmi Constructions'** case (supra), one of

the points for consideration was whether after the contract comes to an end by completion of the contract work and acceptance of final bill in full and final satisfaction and after issuing a No Due Certificate by the contractor, can any party to the contract raise any dispute for reference to arbitration? The Apex Court, after observing that in **Nathani Steels Limited's** case some disputes and differences were amicably settled by and between the parties and in that view of the matter it was held that unless and until the settlement is set aside, the arbitration clause cannot be invoked, observed that the facts of the case in M/s. Reshmi Constructions' case were totally different. It was held that the N.T.P.C. did not raise the question that there had been a novation of contract. The conduct of the parties, as evident from their letters, was showing that not only the final bill submitted by the respondents was rejected but another final bill was prepared with a printed format that a "No Due Certificate" had been executed as otherwise final bill would not be paid. The Respondents M/s. Reshmi Constructions had categorically stated in their letter dated 20-12-1990 as to under what circumstances they were compelled to sign the said printed letter. Considering the same, it was observed that it appears from the appendix appended to the judgment of the learned trial Judge that the said letter was filed even before the trial Court and therefore it

was not a case where M/s. Reshmi Constructions' assertion of "under influence or coercion" could be said to have been taken by way of an afterthought. Further, in para 39 of the judgment, the Apex Court has ruled thus:

> "39. The fact situation in the present case, would lead to the conclusion that the arbitration agreement subsists because:
>
> (i) Disputes as regards final bill arose prior to its acceptance thereof in view of the fact that the same was prepared by the respondent but was not agreed upon in its entirety by the appellant herein;
>
> (ii) The appellant has not pleaded that upon submission of the final bill by the respondent herein any negotiation or settlement took place as a result whereof the final bill, as prepared by the appellant, was accepted by the respondent unequivocally and without any reservation therefor;

(iii) The respondent herein immediately after receiving the payment of the final bill, lodged its protest and reiterated its claims.

(iv) to (xi) ....."

The narration clearly reveals that in M/s. Reshmi Constructions' case, it was found that the contractor had never submitted the final bill as such before issuance of the No Due Certificate. There was neither any settlement revealed from the records nor there was any assertion to that effect by the N.T.P.C.. That is not the case in the matter in hand. In the case in hand, apart from issuing the No Due Certificate, the issuance of such certificate was preceded by forwarding of final bill by the respondents and the Clause 34 of the agreement clearly provided that the respondents would not be entitled to claim escalation charges. Taking into consideration all these facts in totality, the decision in M/s. Reshmi Constructions' case nowhere helps the respondents to contend that the letters issued claiming economic duress for getting the amount released in relation to the final bill could be used to contend that the bill which was submitted as the final bill was not at all the final bill and that the certificate was issued under duress and on that count, the bill

submitted subsequent to the final bill was in fact the final bill.

32. As regards the third ground of challenge about the bar of limitation, undisputedly, the records disclose that the claim was made within the period of limitation prescribed for raising the dispute. Being so, there is no substance in the said ground of challenge.

33. For the reasons stated above, therefore, the appeals succeed and the impugned orders are hereby set aside along with the awards declared by the arbitrator in both the matters. The appellants are entitled for refund of the amount deposited by them pursuant to the interim orders.

(D.G.Karnik, J.) (R.M.S.Khandeparkar, J.)

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